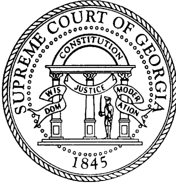

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SUMMARIES OF OPINIONS

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WEST HAMRYKA ET AL. V. CITY OF DAWSONVILLE ET AL. (S12A0215, S12A0217, S12A0218)

In this high profile **Dawson County** case, the Supreme Court of Georgia has dismissed the appeals of a husband and wife involving their lawsuit against Dawsonville city officials. The couple sued the city for approving development of a motorsports park across the road from their property where the wife owns a horse training farm.

In the unanimous opinion, **Justice David Nahmias** writes that the couple failed to follow the correct appeals procedure under the law by filing a "direct" – or automatic – appeal as opposed to filing an application for a discretionary appeal, which the court then determines whether or not to grant.

According to briefs filed in the case, West and Helen Hamryka moved to Duck Thurmond Road in Dawsonville in 1995 where they own 86 acres and she operates a horse boarding and training business called Hidden Still Farm, Inc. The Hamrykas' property is across the road from 152 acres owned by Atlanta Motorsports Park, LLC. On Nov. 3, 2008, the City of Dawsonville adopted a Comprehensive Plan for future development. Under that plan, the property across from the Hamrykas' was originally zoned as "rural residential/agricultural." On Nov. 19, 2008, Jeremy Porter – a representative of Atlanta Motorsports Park – filed a Zoning Map Amendment application asking to rezone the property from residential to commercial to develop the property for a motorsports park. Public hearings were held and in April 2009, the city rezoned the property to commercial. Two months later, the Hamrykas sued the City and city officials, filing a nine-count complaint to stop the rezoning that would allow development of the

racetrack. They argued the proposed "country club for motorsports," where for a fee people would drive cars, go-karts and motorcycles, would create noise, congestion and pollution that would cause irreparable harm to their home and business. In one of the counts, the Hamrykas alleged that the city's approval of the rezoning violated the Comprehensive Plan and was therefore unconstitutional. In a second count, they alleged the city violated the Zoning Procedures Law by denying them equal time at the public hearing to speak in opposition to the project as Jeremy Porter and others were given to speak in favor of it. In a third count, they alleged the city failed to conduct an impact study prior to rezoning the property as required by the Department of Community Affairs.

In February 2011, the trial court entered three separate orders granting "summary judgment" to Atlanta Motorsports Park on these three counts. The trial court has not yet ruled on the remaining six counts of the Hamrykas' complain. (A court grants summary judgment when it determines there is no need for a jury trial because the facts are undisputed and the law falls squarely on the side of one of the parties.) The Hamrykas then filed three direct appeals to the state Supreme Court.

In November 2011, the high court dismissed the appeals for failure to comply with the discretionary appeal procedures of Official Code of Georgia § 5-6-35. After the Hamrykas filed a motion asking the court to reconsider, however, this court reinstated the appeals, asking the parties to argue in briefs whether § 5-6-35 applied. "Having now had the benefit of full briefing and oral argument on the issue, we conclude that these appeals come under § 5-6-35 (a) (1), and so we again dismiss them," today's opinion says.

Under the statute, appeals "from decisions of the superior courts reviewing decisions of…state and local administrative agencies" must be brought by application for discretionary appeal," the opinion says. Here, the Hamrykas' complaint asked the superior court to review a decision of a local administrative agency, and they are now appealing the decision by the superior court. The Hamrykas made presentations in opposition to the rezoning request to the City's Planning Commission and the City Council. They then obtained review in the superior court of the issues they raised before the administrative agencies. "Appellants therefore already had the opportunity to be heard by two tribunals – a local administrative agency and a superior court – and now ask this appellate court to consider the administrative decision yet again," the opinion says. These appeals fall under § 5-6-35 (a) (1), "and appellants were required to follow the discretionary appeal procedures. Because they failed to do so, these appeals must be dismissed."

Attorneys for Appellant (Hamrykas): F. Edwin Hallman, Jr., Richard Wingate
Attorneys for Appellees (City): John Dickerson, B. Nichole Carswell, Dana Miles

<u>SCOTT V. THE STATE</u> (S12A0764)

The Supreme Court of Georgia has reversed the murder conviction and life prison sentence given to a young man for shooting and killing a man he said he believed had been molesting his niece.

In today's unanimous opinion, **Justice Hugh Thompson** writes that a **DeKalb County** trial judge erred in excluding evidence of the alleged molestation. And it was error not to instruct jurors that they could consider the man guilty of the less serious charge of voluntary manslaughter.

According to briefs filed in the case, Steven Lamar Scott, 22, lived with his parents and sister on Wilkins Court in DeKalb County. In a statement Scott gave to police, when his 16-year-old niece came home from school on April 1, 2008, he asked her why the school had been calling. He said she told Scott that her mother's boyfriend, Dan Smith, had been molesting her for eight years. Scott said that "once she told me that, something in me just snapped." Scott said he left to go buy some cigarettes and a beer, which he said calmed him down. After he returned from the store, he and his niece were outside talking when Smith and his sister drove up. The girl told her mother she had something to tell her, and she, Scott and her mother went inside to talk. Smith remained in the car with his seatbelt on. When the girl told her mother about Smith, her mother told her to "quit lying," according to Scott's statement. He told police he then went upstairs, got his gun, walked outside and confronted Smith. He said Smith responded, "that's my b----," and he could do whatever he wanted. Scott said he then "blacked out," and didn't remember what happened next. But according to witnesses, Scott fired 12 rounds at Smith, stopping at one point to reload. Smith died from nine gunshot wounds. When police arrived, Scott was sitting outside smoking a cigarette. He told police that he had "lost [his] mind for a while" because "how could somebody abuse children that way?"

Prior to trial, Scott's attorney said he planned to introduce evidence of the alleged molestation to support a charge of voluntary manslaughter as opposed to the more serious charge of murder. Under state law, a person commits voluntary manslaughter by killing another if he "acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person; however, if there should have been an interval between the provocation and the killing sufficient for the voice of reason and humanity to be heard, of which the jury in all cases shall be the judge, the killing shall be attributed to deliberate revenge and be punished as murder." The State moved to exclude the evidence, and the trial judge ruled in favor of the State, finding "there was not sufficient evidence to rule that Defendant acted as a result of sudden, violent and irresistible passion resulting from serious provocation." Rather, the judge found, that after learning of the alleged molestation, "the Defendant had time to cool down," before having a conversation in the kitchen and going upstairs to get a gun. In March 2010, the jury found Scott guilty of felony murder, aggravated assault and a gun charge, and he was sentenced to life plus five years in prison.

"We conclude the evidence was sufficient to enable a rational trier of fact to find appellant guilty of the crimes charged beyond a reasonable doubt," today's opinion says. However, the trial judge erred by refusing to charge the jury on the less serious offense of voluntary manslaughter. "On the trial of a murder case, if there be any evidence, however slight, as to whether the offense is murder or voluntary manslaughter, instruction as to the law of both offenses should be given the jury," the opinion says, quoting the state Supreme Court's 1975 decision in *Henderson v. State.* Here, in addition to learning about the alleged molestation an hour or two before the shooting, immediately before the shooting his sister said she did not believe her daughter and the victim taunted him by saying, "she's my b----, I can do whatever I want." At that point, he said, he "lost it," and "blacked out."

"While we adhere to the view that 'words alone, regardless of the degree of their insulting nature, will not in any case justify the excitement of passion so as to reduce the crime from murder to manslaughter,' in this case there is slight evidence from which a jury could conclude the victim's words in connection with his conduct served as the 'serious provocation

sufficient to excite…a sudden, violent and irresistible passion,'" the opinion says. "It follows that the trial court's ruling that appellant could not introduce evidence relevant to prove provocation was harmful error."

Attorney for Appellant (Scott): Gerard Kleinrock

Attorneys for Appellee (State): Robert James, District Attorney, John Melvin, Dep. Chief Asst. D.A., Daniel Quinn, Asst. D.A., Samuel Olens, Attorney General, Mary Beth Westmoreland, Dep. A.G., Paula Smith, Sr. Asst. A.G., Katherine Thrower, Asst. A.G.

THE CITY OF SAVANNAH ET AL V. BATSON-COOK CO. ET AL (S11G1814)

The Supreme Court of Georgia has unanimously reversed a Georgia Court of Appeals decision involving a multi-million dollar lawsuit on the ground that the judge who presided over the case should not have ruled on the motion to recuse himself.

"Since the affidavits raised a reasonable question about the trial judge's impartiality that required the assignment of the motion to recuse to another judge, the Court of Appeals erred when it affirmed the trial judge's denial of the motion to recuse…," **Justice Robert Benham** writes in today's opinion. "We reverse the judgment of the Court of Appeals and remand the case to that court with direction that the case be remanded to the Superior Court of Troup County for disposition of the motion to recuse by a different judge."

The case involves a lawsuit that grew out of a contractual dispute between the City of **Savannah** and its contractor and a sub-contractor. In revitalizing historic downtown Savannah, the City hired Batson-Cook Co., a contractor headquartered in Troup County, to design and build an underground parking garage. Batson-Cook subcontracted with Raito, Inc., a California corporation, to construct the parking lot's excavation support system. According to briefs filed in the case, the contract had a provision requiring Batson-Cook to notify the City within 21 days if it encountered "materially differing site conditions" than what was defined in the contract. During its work, Raito encountered soft clay, which it claimed was a materially differing site condition that entitled it to additional compensation from Batson-Cook. When it did not get paid for the additional work, in March 2008, Raito sued Batson-Cook in Troup County, which is part of the multi-county Coweta Judicial Circuit. Batson-Cook then filed a third-party complaint against the City, seeking reimbursement for any damages it would owe Raito, as well as for additional damages it claimed it had incurred as a result of the City's refusal to adjust the guaranteed maximum price based on the differing subsurface soil conditions.

Following a three-week trial, the jury awarded $2.7 million to Raito against Batson-Cook and about $17 million to Batson-Cook against the City, which included $2 million to cover attorney's fees. The jury awarded the City $594,000 against Batson-Cook, finding the contractor had racked up 198 days of unexcused delay. The City appealed, claiming the trial court made eight errors, all of which involved pre-trial or procedural matters. However, the Georgia Court of Appeals affirmed the judgment of the trial court. The City then appealed to the state Supreme Court, which agreed to review the case, but only to consider one issue – whether the allegations raised in the City's pre-trial motion asking the judge to recuse himself were legally sufficient to require another judge to consider the motion.

In today's opinion, the high court says the allegations raised were sufficient to require assignment of the motion to another judge. According to three affidavits signed by attorneys representing the City, prior to the filing of the lawsuit, the judge – former Chief Judge William F.

Lee, Jr. of the Coweta Judicial Circuit – had engaged in a "social conversation" with J. Littleton Glover, Jr., a senior partner of Glover & Davis, which is Batson-Cook's general counsel. Glover told the judge that Batson-Cook was going to have a complex case coming up in Troup County Superior Court. When the judge asked Glover if his firm would be representing Batson-Cook in the matter, Glover said no. The judge's nephew, Nathan Lee, at the time was an associate in that firm. According to one of the affidavits, before the lawsuit was filed, Nathan Lee wrote a letter on behalf of Batson-Cook to the liability insurance carrier for Raito, putting it on notice of the claims that later became the basis of the lawsuit. Shortly after the lawsuit was filed, Judge Lee entered an order assigning the case to himself. Within five days of learning about the relationship between the judge and his nephew, the City filed its motion asking him to recuse himself. Judge Lee denied the City's motion to recuse, as well as the City's other motions.

"It is vital to the functioning of the courts that the public believe in the absolute integrity and impartiality of its judges, and judicial recusal serves as a linchpin for the underlying proposition that a court should be fair and impartial," today's opinion says. Judicial recusal is addressed in both the Code of Judicial Conduct and state law. Under Canon 3 of the Code, "[j]udges shall disqualify themselves in any proceeding in which their impartiality might reasonably be questioned…." Official Code of Georgia § 15-1-8 also states that no judge shall "[p]reside, act or serve in any case or matter when such judge is related by consanguinity or affinity within the sixth degree…to any party interested in the result of the case or matter." Nathan Lee is related to the judge within the *second* degree, the City's attorneys pointed out.

"In the case before us, the familial relationship between the judge and an attorney who had represented one of the parties in the underlying dispute that resulted in the litigation and who was employed by a firm, a partner of which was general counsel to a party in the case…and whose conversation with the trial judge advising him of the existence of the case was followed by the trial judge's assignment of the case to himself, are objective facts which we conclude would cause a fair-minded and impartial person to have a reasonable perception of the trial judge's lack of impartiality," the opinion says.

Attorneys for Appellant (City): Gregory Morgan, Elizabeth Hodges, James Blackburn, Peter Giusti

Attorneys for Appellees (Batson): C. Jerry Willis, Mark DeGennaro, Robert Glenn, Jr., Adam Hames, Stanley Karsman, Brian Vella, Jennifer Mahar

WHITAKER V. THE STATE (S12A0640)

The Georgia Supreme Court has upheld the murder conviction and life prison sentence given to a man in **Dougherty County** for killing his girlfriend's 12-month-old baby boy by shaking him and slamming his head against a hard surface.

In today's unanimous opinion, written by **Presiding Justice George Carley**, the high court has rejected each of the man's claims of error, including that a 10-year delay from the time he requested a new trial until there was a hearing on his motion violated his constitutional rights to due process. Despite the delay, the high court finds it did not damage – or "prejudice" the man's case. "Therefore, Appellant's due process rights were not violated by the 10-year delay between trial and appeal," today's opinion says.

According to the facts presented at trial, on May 17, 1999 Shonda Sweet left her twin 13-month-old twins, Darrius and Tarrius, with her live-in boyfriend, Tony Orlando Whitaker, while

she went to a job interview and later to Tallahassee, FL for the afternoon with a friend. The babies were recovering from a cold. When Sweet left, the twins were clean, dressed and sleeping in the middle of the couple's bed. On her way home that evening, a police officer called Sweet and asked her to come to Phoebe Putney Memorial Hospital, where she learned that Darrius was dead. Earlier that evening, Whitaker had called his godmother, Dorothy Williams, and asked her to come to his duplex. When she arrived, she found Darrius lying face down on the corner of the bed with fluid coming from his nose. The baby's lips were purple. Her husband called 911, and at some point, Whitaker told him he'd given Darrius a bottle, laid him down and Darrius had vomited. After cleaning up the baby, he'd noticed something was wrong and called Williams. Paramedics testified they were unable to revive the baby, and one said he was "frustrated" because no one at the scene would claim responsibility for the baby and seemed to have a "nonchalant" attitude. A police officer testified that when a doctor told Whitaker the baby was dead, he was "very flat, very calm." A child protective services worker, who had been summoned by hospital staff, testified that when she asked Whitaker why he'd called his godmother instead of paramedics, he told her he'd been outside smoking, heard a loud noise and came inside to find Darrius crying. He picked him up to calm him, then laid him back down. When he came back to check, the baby wasn't breathing. He told a police officer the baby had been throwing up all day and at some point stopped breathing. When the officer told him the baby had a knot on his head, Whitaker quickly said the baby had fallen.

The forensic pathologist who performed the autopsy testified there was swelling and a "patterned" injury on the back of the baby's head of three separate vertical lines that suggested he had been slammed into an uneven surface. The bruises on his forehead indicated "grip marks where someone grabbed the child's head and squeezed vigorously, or knuckle marks where somebody's rapped a knuckle on the head, or even knuckle marks in terms of punching." The baby had skull fractures, damage to his brain, including hemorrhages and swelling of the brain, and fresh bruises along his buttocks, back and head, caused by blunt force trauma from "shaking and impact." The pathologist stated the baby would have died within 30 minutes and the injuries were inconsistent with a simple fall off the bed.

In January 2000, a jury found Whitaker guilty of felony murder and cruelty to children and he was sentenced to life in prison. In his appeal to the state Supreme Court, among his arguments was that the evidence against him was all circumstantial and therefore the state had to prove that the facts excluded every other reasonable hypothesis other than that of his guilt. However, in today's opinion, "we conclude that the evidence is sufficient to have authorized a jury to find that the State excluded all reasonable hypotheses except that of Appellant's guilt, and to have authorized any rational trier of fact to find Appellant guilty beyond a reasonable doubt." As to his speedy trial claims, Whitaker argued that his case had been damaged by the 10-year delay because his attorney couldn't remember details of the case that were critical to his appeal on the ground that his attorney had been ineffective for failing to raise a preexisting medical condition Darrius had and for failing to object to the prosecutor's use of a Styrofoam head in reenacting for jurors how the baby had been injured.

"However, a thorough review of the transcript of the hearing on the motion for new trial reveals that trial counsel remembered sufficient details of the case to reply to Appellant's assertions of ineffectiveness," today's opinion says. Whitaker's trial attorney testified that the defense's own expert agreed the baby's death was a homicide and not due to anything else. For

this and other reasons, "the errors that Appellant claims he would have raised on appeal 'are without merit [and] there can…be no prejudice in delaying a meritless appeal,'" the opinion says.
Attorney for Appellant (Whitaker): Kevin Armstrong
Attorneys for Appellee (State): Gregory Edwards, District Attorney, Arkesia Jenkins, Asst. D.A.

ROYAL CAPITAL DEVELOPMENT, LLC V. MARYLAND CASUALTY COMPANY (S12Q0209)

The Georgia Supreme Court has answered a "certified" question from the U.S. Court of Appeals for the Eleventh Circuit, ruling in favor of a development company that had sued its insurance company.

Royal Capital Development, LLC owns The Capital Building, an eight-story commercial building on East Paces Ferry Road in Buckhead. In 2003, Royal Capital purchased a commercial property insurance policy from Maryland Casualty Co. Under the policy's terms, Maryland Casualty agreed to "pay for direct physical loss of, or damage to, Covered Property." In 2008, construction on an adjacent property damaged The Capital Building. According to Royal Capital, severe shaking and vibration, combined with the displacement of soil from the installation of a system of tie-back rods underneath the building, caused the damage. Royal Capital submitted a claim to Maryland Casualty, seeking both the cost of the repairs and coverage for the post repair reduction in market value – or "diminution in value." Maryland Casualty paid Royal Capital $1.1 million to compensate it for the estimated costs of repairing the damage. But it refused to compensate the company for the alleged "diminution in value" of the property, which Royal Capital claimed ranged from $2.7 to $5.6 million.

In 2010, Royal Capital sued Maryland Casualty for breach of contract in **Fulton County** Superior Court to recover the loss of the post-repair decline in value of its building. Maryland Casualty had the case moved to the federal court system and in December 2010, the U.S. District Court for the Northern district of Georgia ruled in favor of Maryland Casualty, finding that "diminution-of-value" damages were not included under the insurance policy. Royal Capital then appealed to the U.S. Court of Appeals for the Eleventh Circuit, which has certified to the state Supreme Court the question of whether under Georgia law, an insurer must pay not only for the costs of repair but also for the alleged "diminution in value" of the building when the cost of repairs does not fully compensate the insured.

In today's unanimous opinion, **Justice Hugh Thompson** writes that the answer is yes. "This Court has consistently held that the measure of damages in such cases is intended to place an injured party, as nearly as possible, in the same position they would have been if the injury had never occurred," the opinion says. "Based on well-established precedent authorizing full recovery, including in some circumstances both diminution in value and cost of repair, we thus reject Maryland Casualty's contention that the contract at issue did not include coverage for post-repair diminution in value…."

The primary issue is whether the Georgia Supreme Court's 2001 decision in *State Farm v. Mabry* applies to this case. Under *Mabry,* the Court ruled that an automobile insurance policy that promises to "pay for loss to" a vehicle covers not only the cost of repairing the vehicle to its pre-accident condition, but also the decline in value of the vehicle caused by the accident.

Maryland Casualty argued the District Court correctly ruled that *Mabry* had no effect on this case because it dealt exclusively with a consumer automobile policy.

But the Georgia Supreme Court disagrees. "We adhered in *Mabry* to the long-standing contract interpretation rule in Georgia that where '[an] insurance policy, drafted by the insurer, promises to pay for the insured's loss, what is lost when physical damage occurs is both utility and value; therefore, the insurer's obligation to pay for the loss includes paying for any lost value,'" today's opinion says. "We see no reason to limit our holding in *Mabry* to automobile insurance policies and we thus answer the primary question posed by the Eleventh Circuit Court of Appeals in the affirmative: The *Mabry* rule applies to the insurance contract at issue in this case."

Attorneys for Appellant (Royal Capital): Alan Lubel, Sofia Jeong
Attorneys for Appellee (Maryland Casualty): J. Randolph Evans, J. Stephen Berry

ELLIS V. JOHNSON ET AL. (S12A0315)

The Georgia Supreme Court has upheld a **Dougherty County** Probate Court's grant of a woman's request for a jury trial to determine the validity of her uncle's latest will in which he replaced her with "a friend and neighbor" as the primary beneficiary of his estate.

The legal issue in this case is whether under state law, the probate court had the authority to grant a jury trial. Under Official Code of Georgia § 15-9-120, a person has the right to a jury trial in a probate court if the probate court is in "a county having a population of more than 96,000 persons according to the United States decennial census of 1990 or any future such census…." By the 2010 census, Dougherty County's population had declined from over 96,000 to 94,565.

But in today's opinion, **Justice David Nahmias** writes that "for more than 70 years, this Court has held that when a statutory classification is based on a county's having a specified population under a particular census *or* any future census, the use of the disjunctive 'or' creates the required elasticity, setting a starting population but then permitting counties to move into or fall out of the class based on the latest census."

The case stems from the death of Hubert H. Johnson who owned a farm in Dougherty County. According to briefs filed in the case, Johnson had adopted his wife's son, Henry G. Johnson, when Henry was 18. Because Johnson's wife died before he did, Henry was by law his only heir. But father and son had a falling-out, and the two never reconciled. Henry had a niece, Kendall Hash, however, and she claims her uncle intended to leave the farm to her. Hash, a physician, testified that Johnson and his wife were essentially her "grandparents" and on many occasions, Johnson had driven her around the farm, explained what he wanted her to do with it, and told her she would one day inherit it. Lynn Burrell ran the farm for Johnson, baling hay, feeding cows and picking up limbs. Burrell lived in a house that Johnson had deeded to him. In his initial will, which he had drawn up in 2001, Johnson left everything to Hash, with the exception of his guns, farm equipment and tools, which were bequeathed to Burrell. In May 2005, Donna Ellis, whose husband had passed away, moved in with Burrell. Soon she too was working on the farm and started spending time with Johnson. The two would check on the cattle together and inspect the pecan trees. In September 2006, Johnson had his will changed, replacing Hash with Ellis as the beneficiary of his estate. Subsequently, he had four successive wills drawn up, switching the beneficiary back and forth between Hash and Ellis. In the fourth version –

signed in June 2008 – Johnson again left everything to his niece. But on May 28, 2009, Johnson allegedly called the lawyer, asking him to come to his house so he could change his will yet again. That was the final will, in which Johnson left everything to Donna Ellis. The lawyer later testified that Johnson felt "Kendall might be more likely to sell [the farm] than Donna." Johnson also felt that as a physician, Hash "was well provided for," the attorney said.

In June 2009, following Johnson's death, Ellis filed a petition to "probate" the will – or authorize it as authentic and valid. In July, Johnson's son, Henry, filed a "caveat," challenging the validity of the will on several grounds, including undue influence and false representations. The son alleged his father "was incompetent, both mentally and physically, and was mentally impaired and lacked sufficient understanding or capacity to make significant responsible decisions concerning disposition of his estate and property." In October 2009, Hash filed a "motion to intervene," which the probate court granted in February 2011. The next day, Hash filed a demand for a jury trial. Ellis objected, but the probate court granted Hash's request. Ellis then appealed to the state Supreme Court, arguing several things, including that § 15-9-120 gives "expanded jurisdiction" only to counties with more than 96,000 persons, which Dougherty County no longer has. Ellis' attorneys argued the statute is an unconstitutional "special law" that does not apply uniformly to everyone because the language does not state that a county loses the authority to conduct jury trials if its population falls below the threshold. The probate court interpreted the statute to permit it to continue to hold jury trials even though Dougherty County's population had dropped below 96,000 and ruled that, as a result, the statute was a constitutional "general law."

In today's opinion, the Georgia Supreme Court disagreed with the probate court's reasoning but nevertheless affirmed its judgment because it reached the right result in ruling that the statute was a constitutional general law. Furthermore, this year, after the 2010 census showed that Dougherty County's population had dipped below 96,000, the General Assembly amended the law to set the population threshold at 90,000. The Dougherty County probate court maintains the right to hold jury trials, the high court rules.

Attorneys for Appellant (Ellis): Richard Fields, George Donaldson, III
Attorney for Appellees (Johnson): Kermit Dorough, Jr.
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OTHER CASES APPEALED FROM THE GEORGIA COURT OF APPEALS

APPLETON V. ALCORN ET AL. (S11G1145)

The Georgia Supreme Court has upheld a decision by the Georgia Court of Appeals that allows the daughters of a deceased man to pursue a lawsuit against their father's second wife. The woman was separated from their father when he died, and the daughters hope to recover the benefits that were paid to her under his employee benefits plan.

According to briefs filed in the case, Bonnie Ann Appleton and Richard Lee Alcorn married in 2001. Alcorn was a pilot for Atlantic Southeast Airlines, Inc., where he participated in two benefit programs: a 401(k) and a life insurance policy. The couple eventually separated, and in July 2007, signed a Settlement Agreement, which was later incorporated into an Order of Separate Maintenance. The agreement stated: "Each party shall have the right to name any person or organization they so choose as beneficiary of their life insurance policies. Each party

waives any interest they may have in the other party's life insurance proceeds, cash value or otherwise." It also said: "The parties agree to waive and release any rights or claims they may now have to any retirement pay, benefits or privileges earned by the other during or before their marriage." And: "The Wife hereby waives all rights to claim any interest or share in the Husband's [I]ndividual Retirement Accounts, which shall become his sole property. In the same manner, the Husband hereby waives all rights to claim any interest or share in the Wife's Individual Retirement Accounts, which shall become her sole property."

Less than a year after signing the agreement, in April 2008, Alcorn died suddenly from a heart attack. At the time of his death, the couple was still married, Alcorn had not designated a beneficiary for his 401(k) plan, and his wife remained the beneficiary on his life insurance plan. The plan proceeds were distributed to Appleton, consistent with the federal Employee Retirement Income Security Act (ERISA). Following payment to Appleton, Alcorn's daughters – Tiffany Marie Alcorn and Amy Darlene Alcorn – sued Appleton in **Cobb County** Superior Court for breach of contract. In their complaint, they claimed Appleton breached the settlement agreement by pursuing the retirement and life insurance benefits of their father and then by refusing to sign a waiver of her rights to the benefits despite their repeated requests that she do so. Appleton filed a motion asking the court to dismiss their case. The trial court granted her motion and dismissed the claim. It found that under the U.S. Supreme Court's 2009 decision in *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan,* she was properly awarded the benefits under the ERISA plans because the waiver she had signed in the settlement agreement was not compliant with the federal statute. The daughters appealed to the Court of Appeals, which reversed the trial court. The appeals court concluded that the disbursement of ERISA funds to Appleton did not preclude the Alcorns from filing a state law action against her to recover the funds based on the terms of the separation agreement. It found that in *Kennedy*, the U.S. Supreme Court specifically declined to settle the issue of whether an estate can bring a state law action to recover funds distributed from an ERISA plan to an individual who had waived her right to them.

In today's unanimous decision, written by **Justice Robert Benham**, the high court agrees with the Court of Appeals. "[O]nce funds from ERISA-covered plans are received by the proper participant or beneficiary, the participant or beneficiary is not judgment proof, and the funds are not sheltered from state law causes of action," the opinion says. "In this case, since the proceeds of the ERISA-covered plans were paid out to appellant and were no longer in the control of the plan administrator, the trial court erred when it dismissed the appellees' breach of contract claim against appellant and the Court of Appeals acted appropriately when it reversed the trial court's judgment."

Furthermore, *Kennedy* "does not require a different result," the opinion says. "The Supreme Court stated that it expressed no view 'as to whether the Estate could have brought an action in state or federal court against [the beneficiary] to obtain the benefits after they were distributed."

Attorney for Appellant (Appleton): David Hungeling
Attorney for Appellees (Alcorns): Mark Bullman

GREENE COUNTY SCHOOL DISTRICT V. CIRCLE Y CONSTRUCTION, INC. (S11G1170)

The Supreme Court of Georgia has upheld a decision by the Georgia Court of Appeals, which ruled in favor of a construction company that had sued the **Greene County** School District for breach of contract. But in an opinion written by **Justice Robert Benham**, the high court is sending the case back to the Court of Appeals with instructions that it vacate a portion of its ruling that unnecessarily addresses a Georgia statute.

Because the Court of Appeals ruled the lawsuit had alleged that voters approved the multi-year contract in a referendum, "it was not necessary for the Court of Appeals to construe [Official Code of Georgia] § 20-2-506(h) in order to resolve the appeal," today's opinion says.

In April 2008, Circle Y Contruction, Inc. signed a contract with the school district to supply construction management services for projects designed to renovate, repair, improve and add to the school district's facilities. The projects were allegedly to be constructed with Educational Local Option Sales Tax funding and had been approved in a referendum by the county's voters. The contract dictated extensive duties Circle Y was to perform, including preparing, managing and supervising the construction, architectural planning and scheduling for the projects. The contract did not contain a termination date but said either party could terminate the contract for cause upon seven days' written notice.

According to briefs filed in the case, about 11 months after entering into the contract, the school district sent Circle Y a letter terminating it. In May 2009, Circle Y sued the school district, seeking damages for breach of contract and alleging that the school district had terminated it without cause. It further alleged the district had failed to pay it for work it had already performed, as well as work it had done above and beyond the contract. The school district filed a motion to dismiss the complaint. It contended that under § 20-2-506, the multi-year contract was void because the statute says school district contracts "shall terminate…at the close of the calendar year," although they may be renewed yearly. The trial court denied the motion, and the school district filed a pre-trial appeal in the Court of Appeals. That court upheld the trial court's decision, ruling that when voter approval is obtained for a multi-year contract, as it was alleged here, the contract is constitutionally valid. It also found that the contract involved a "proprietary function" as opposed to a governmental function, and therefore it was exempt from the statute's requirements, including the one-year termination. Municipal governments are viewed as having two functions: a "proprietary" or corporate function, and a governmental or public function. In its ruling, the Court of Appeals determined that while the decision to engage in the construction projects for Greene County "may have been governmental," the district's "solicitation of private assistance from Circle Y to perform the subsequent steps necessary to complete the projects was proprietary in nature."

"However, [Official Code of Georgia] § 20-2-506 comes into play only when a school system enters into a multi-year acquisitional contract that has **not** received voter approval," today's decision says.

"Accordingly, we remand the case to the Court of Appeals with direction that it vacate that portion of Division One that addresses OCGA § 20-2-506."

Attorneys for Appellant (District): J. Stanley Hawkins, Reagan Sauls
Attorney for Appellee (Circle Y): Brenda Trammell

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IN OTHER CASES, the Supreme Court of Georgia has upheld **murder** convictions and life prison sentences for:

* Diego Bailey (Cobb Co.) **<u>BAILEY V. THE STATE</u> (S12A0671)**
* Juan Flowers (Fulton Co.) **<u>FLOWERS V. THE STATE</u> (S12A0155)**
* Travis Cental Glover (Bibb Co.) **<u>GLOVER V. THE STATE</u> (S12A0682)**
* Lavar Anthony Hill (DeKalb Co.) **<u>HILL V. THE STATE</u> (S12A0948)**
* Jonathan Matthew Rucker (Douglas Co.) **<u>RUCKER V. THE STATE</u> (S12A0495)**
* Theodore F. Sharpe (Richmond Co.) **<u>SHARPE V. THE STATE</u> (S12A0677)**

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IN DISCIPLINARY MATTERS, the Supreme Court has accepted a petition for voluntary discipline and ordered the **public reprimand with conditions** of attorney:

* Jefferson Lee Adams **<u>IN THE MATTER OF: JEFFERSON LEE ADAMS</u> (S12Y1117, 1118 and 1119)**

The Court has ordered a **review panel reprimand** of attorney:

* Dock H. Davis **<u>IN THE MATTER OF: DOCK H. DAVIS</u> (S12Y0997)**